No. 49346-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROGER DUANE CALHOON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch, Judge
Cause No. 15-1-01317-7

BRIEF OF RESPONDENT

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1. Whether the trial court abused its discretion by ordering that Calhoon wear a leg restraint that was entirely hidden by his clothing and not visible to the jury.

2. Whether the trial court violated Calhoon's CrR 3.3 right to a speedy trial by granting the State's motion for a continuance based on the temporary unavailability of three of the four State witnesses.

3. Whether the trial court abused its discretion by admitting evidence that Calhoon refused to cooperate with the State Troopers, resisted arrest, and displayed a bumper sticker indicating an unwillingness to submit to authority.

4. Whether the trial court violated Calhoon's rights under both the United States and Washington constitutions to represent himself when it denied his motion to proceed pro se on the basis that he lacked the capacity to represent himself.

5. Whether the State should be awarded appellate costs should it substantially prevail on appeal.

B. STATEMENT OF THE CASE.

The State accepts Calhoon's statement of the procedural facts and statement of the substantive facts with one exception. He states that during the forced entry into Calhoon's vehicle the Washington State Troopers utilized a dog which was sent in through the passenger door. Appellant's Opening Brief at 13. In fact, the dog in the car belonged to Calhoon. RP 181, 321.[1]

1 Unless otherwise designated, references to the Verbatim Report of Proceedings are to the two volume transcript dated May 4, 11, 18, 2016, and July 26, 2016 (Volume I), and July 27-28, 2016 (Volume II).

Trooper Ball testified he was unwilling to enter Calhoon's vehicle because he did not know the dog and did not want to risk being bitten. RP 181. At sentencing, Calhoon asked to get the dog back because "she's a hand on my ranch," RP 321, even though he earlier said he had no source of income. RP 320. The record contains no mention of a police dog even being present.

C. ARGUMENT.

1. The trial court did not abuse its discretion by ordering Calhoon to wear a leg restraint during trial. Even if it were error, it was harmless.

On the first day of trial, before voir dire began, the trial court held a hearing to determine whether or not Calhoon would be required to wear a leg restraint while in the courtroom. RP 48-64. The court heard testimony from a corrections officer and argument from both attorneys. Id. At the conclusion of the hearing, the court ordered that Calhoon would be required to wear the leg brace. RP 63-64. Calhoon objected to the restraint at trial. RP 48. On appeal he argues that the trial court abused its discretion in ordering him to wear it.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape,

injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), *review denied*, 145 Wn.2d 1016, 41 P.3d 482 (2002). "It is fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public." State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). Shackles and handcuffs are not per se unconstitutional. In re Pers. Restraint of Davis, 152 Wn.2d 647, 694, 101 P.3d 1 (2004).

Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to Hartzog, 96 Wn.2d at 400).

The right to appear in court without restraints is not unlimited. State v. Finch, 137 Wn.2d 792, 846, 975 P.2d 967 (1999). A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. Damon, 144 Wn.2d at 691-92. Regardless of the type of proceeding, and whether or not a jury is present, it is for the court, not jail or prison administrators, to determine whether and how restraints will be used. State v. Walker, 185 Wn. App. 790, 797, 344 P.3d 227 (2015). The standard of review is abuse of discretion, recognizing that the trial court has broad discretion. Hartzog, 96 Wn.2d at 401.

One of the difficulties in applying the principles articulated by these cases is that terms are used interchangeably, rarely defined, and generally used without reference to the facts of the cases from which they came. For example, in Hartzog, the court was addressing the question of whether the court could impose a blanket requirement of the use of restraints on penitentiary inmates while they were in the courtroom. Hartzog, 96 Wn.2d at 385. Hartzog was "shackled," but shackles were not defined. Id. at 388-89. The opinion also use the term "restraints" or "physical

restraints", also without defining those terms. Id. at 397-98, 401. The two are used interchangeably. "Further, if restraints are found necessary, those persons shackled may be in place at the time the jury is brought into the courtroom . . ." Id. at 401.

In Elmore, the defendant appeared on the first day of his sentencing hearing with "his hands and feet manacled." Elmore, 139 Wn.2d at 263. The opinion then refers to him being "shackled." Id. at 272, 274. The court's recitation of the law uses the terms "shackling" and "restraining" interchangeably. Id. at 273-74. The defendant in Finch was ordered to wear leg shackles during the entire trial, as well as additional handcuffs during the testimony of two key witnesses; his right hand was handcuffed to his chair and the shackles were handcuffed to the leg of the table. Finch, 137 Wn.2d at 804, 850-51. During its discussion, the court referred to those as "restraints." Id. at 853. The defendant in Davis wore ankle shackles to court on the first day of voir dire. His attorney objected and after a hearing the trial judge ordered that he be shacked during trial, but the jury's view of his legs would be blocked. Davis, 152 Wn.2d at 676-77. That trial ended in a mistrial and Davis wore ankle shackles without objection during the second

trial. Id. at 677, 699. The Supreme Court in that case included a definition of a "shackle:"

> A "shackle" is defined as "something that confines the legs or arms so as to prevent their free motion; . . .a ring or band enclosing ankle or wrist and fastened to something else (as its mate) by a chain or strap: MANACLE, FETTER . . . " WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2297 (1993).

Id. at 693, n. 109. The opinion uses the terms "shackles" and "restraints" without further distinction. *E.g.*, Id. at 694-99.

Exactly what restraints are at issue is important because of the rights to be protected. The defendant has a right to a fair trial, and restraints can affect that right in three ways. First, they may violate the presumption of innocence. Finch, 137 Wn.2d at 844. The defendant has the right to appear before the jury "with the appearance, dignity, and self-respect of a free and innocent man." Id. Second, "shackling or handcuffing" is disfavored because it tends to prejudice the jury against the defendant. Id. at 845. Third, "shackling or handcuffing" restricts the defendant's ability to assist his counsel and to testify, and it "offends the dignity of the judicial process." Id.

These concerns, then, fall into two categories: one, how the jury perceives the defendant, and two, the ability of the defendant to participate in his own defense. The Davis court said:

> Because *visible shackling or handcuffing* a defendant during trial is likely to prejudice a defendant, the practice "should be permitted only where justified by an essential state interest specific to each trial."

Davis, 152 Wn.2d at 694-95, quoting Holbrook v. Flynn, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), emphasis added.

> The test is "'whether what [the jurors] saw was so inherently prejudicial as to pose an unacceptable threat to defendant's rights to a fair trial.'"

Davis, 152 Wn.2d at 685, quoting Rhoden v. Rowland, 10 F. 3d 1457, 1460 (1993), which quoted Holbrook, 475 U.S. at 572. "There is no dispute that prison garb, shackles and handcuffs have effects on a jury that are hard to quantify." State v. Rodriquez, 146 Wn.2d 260, 266, 45 P.3d 541 (2002).

The jury will not be prejudiced against a defendant wearing restraints, nor will restraints impinge on the presumption of innocence, if the jury never knows they are there. In the cases cited above, the defendant was wearing some kind of restraints that were easily visible to the jury, and the problem was that the jury did

see them. Leg shackles and handcuffs are hard to hide, particularly when the defendant is also handcuffed to pieces of furniture. In this case, Calhoon was wearing a leg brace that was completely concealed by his clothing. It allows normal movement unless the wearer extends his leg out straight as would be necessary to run or kick. RP 52. The trial court noted, following jury selection, that it had been watching Calhoon during the morning and had not been able to see the leg brace, nor had Calhoon had any difficulty with it when he moved around the table following the swearing in of the jury. RP 125. Calhoon did not testify, so there was no issue of him walking to the witness stand in the presence of the jury. RP 248, 258. There could have been no prejudice to Calhoon because of the leg brace; the jury never knew he was wearing one. He was not shackled or handcuffed or manacled; there were no belly chains, gags, restraint chairs, or any other apparatus that the jury must necessarily have seen.

Even so, Calhoon argues that nothing in the record affirmatively establishes that no juror was aware of the leg brace. Appellant's Opening Brief at 21 (". . . nothing in the record suggests what may have been visible from the jury's perspective . . ."). But a reviewing court is not to speculate that facts not in the record might

exist. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977); Barker v. Weeks, 182 Wash. 384, 391, 47 P.2d 1 (1935) (where the record is silent the court will not presume the existence of facts). There is nothing in the record to even hint that any juror was aware of the leg restraint.

Similarly, there is no hint in the record that Calhoon's ability to assist his attorney or participate in his defense was in any way impaired by the leg restraint he was wearing. The trial court noted near the end of the restraint hearing that Calhoon had been communicating regularly with his attorney. RP 63. He chose to remain silent, RP 248, rather than testify, suggesting that his choice not to take the witness stand was not influenced by the leg restraint. There is no evidence whatsoever that the leg brace interfered with Calhoon's ability to participate in his defense.

a. Harmless error

Restraining a defendant, even by means visible to the jury, is not alone unconstitutional. Davis, 152 Wn.2d at 694. Even if it were error to order Calhoon to wear the leg restraint, it is subject to a harmless error analysis. Id.; Hutchinson, 135 Wn.2d at 888. If, beyond a reasonable doubt, the jury would have reached the same

result even had he not been wearing the restraint, then the error is harmless. Finch, 137 Wn.2d at 859, 862.

If the trial court here erred, it was by ordering Calhoon to wear the leg brace. Because the jury did not know that Calhoon was restrained, it would not have reached a different verdict even if he had not been wearing the device. Any error was harmless.

b. Abuse of discretion

Calhoon maintains that the trial court abused its discretion by ordering the leg brace without finding any particularly egregious reasons to do so. He points to factors considered in Finch and argues that those did not apply to him. Appellant's Opening Brief at 17-19. The Finch court, however, said in dicta that "simply listing these factors, without more, is not particularly helpful." Finch, 137 Wn.2d at 849. The question is whether there is a need to restrain the defendant. Id. Considerations include whether or not the defendant can behave in an orderly manner in the courtroom and compelling circumstances indicating a need to maintain security of the courtroom. Id. at 850.

As the trial court noted, Calhoon was clear that he did not believe the court had authority over him. RP 61. During the hearing held pursuant to his request to proceed pro se, Calhoon gave a

lengthy, rambling, and mostly nonsensical explanation of his understanding of jurisdiction, as well as the general political structure of the United States government. 06/08/16 RP 15-28. The corrections officer who testified explained that Calhoon challenged every instruction or order he was given and wanted to argue every issue. RP 54-55. The jail found his behavior unpredictable. RP 55. Evidence at trial showed that during the event resulting in the eluding charge, Calhoon blatantly challenged the authority of the police officers and fought physically to avoid being arrested. RP 161-182; 204-06; 242-44. While the court did not elaborate about any particular factor, it was clearly aware of the considerations involved in making its decision. RP 62.

A trial judge has the inherent power to provide order and security in the courtroom. Hartzog, 95 Wn.2d at 401. The court has "broad discretion" in choosing the methods for doing so. Rodriguez, 146 Wn.2d at 264. Even ordering a defendant to wear visible shackles in front of the jury does not make reversal mandatory. Id. at 270. Here the trial court articulated its reasons for requiring Calhoon to wear a restraint device that was not visible to the jury and did not interfere with his ability to consult with his attorney or otherwise participate in his defense. There was no

abuse of discretion. There was no violation of Calhoon's constitutional right to a fair trial.

2. The trial court did not violate Calhoon's court rule right to a speedy trial.

Calhoon argues that the trial court violated his CrR 3.3 right to a speedy trial by granting the State's second motion to continue, which was based on the unavailability of three of the State's four witnesses. He does not challenge any of the other continuances, nor does he claim that his constitutional right to a speedy trial was violated.

The speedy trial right exists to protect specific interests. Those are:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (footnote omitted).

A reviewing court will not disturb an order granting a continuance "absent a showing of a manifest abuse of discretion." State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996).

Whether a court correctly applied CrR 3.3 is a question of law reviewed de novo. State v. Lackey, 153 Wn. App. 791, 798, 223 p.3d 1215 (2009). A claim that the court's ruling denied the defendant his constitutional right to a speedy trial is reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); *see also* United States v. Wallace, 848 F.2d 1464, 1469 (9th Cir. 1988) (a Sixth Amendment speedy trial claim is reviewed de novo).

A defendant being detained in jail must be brought to trial within 60 days of the "commencement date," which is usually the date of arraignment. CrR 3.3(b)(1). Periods of time excluded from this 60-day limit include those required by the administration of justice so long as the continuance will not prejudice the defendant's presentation of his case. CrR 3.3(e)(3), (f)(2). If a period is excluded, then "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). Thus, each excluded period brings with it a 30-day extension of the speedy trial deadline. *See* CrR 3.3(b)(5).

Ruling on a motion to continue is discretionary with a judge because it involves "such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures." State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242

(1974). "Trial within 60 days is not a constitutional mandate." State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (9184).

The unavailability of a material witness for the State is a valid ground for continuing a criminal trial if there is a valid reason for the unavailability, where there is reason to believe the witness will be available within a reasonable time, and if there is no substantial prejudice to the defendant. State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). "Courts should be allowed the discretion to grant a continuance to make available a material State witness where the defendant's case is not *unfairly or unjustly* prejudiced." Id. at 550 (emphasis in original).

On May 18, 2016, trial was set for June 20. 06/15/16 RP 6. The State issued subpoenas on May 19 for all four of the State Patrol troopers it planned to call as witnesses. Id. That same day Trooper Ball, who was the State's primary witness, informed the prosecutor that he was unavailable until July 25. Id. On June 10, the prosecutor was notified by a second witness that he was unavailable on June 20, and on June 13 a third witness advised that he was going to be at training on June 20. The State sought a continuance by filing a motion for continuance on June 14, 2016. CP 130-32. A hearing was held the following day. 06/15/16 RP.

Calhoon maintains that the trial court did not have sufficient basis to find that a continuance was necessary under CrR 3.3(f)(2). He claims that the State was dilatory for failing to secure the testimony of the unavailable primary witness, ensuring that the remaining three witnesses would be available for trial, making a record of efforts to secure the presence of the witnesses, and declining to rely solely on the testimony of the fourth, and only available, witness for trial on June 20. Appellant's Opening Brief at 24-25.

Calhoon does not specify how the State should have secured the testimony of the primary witness. CrR 4.6 permits depositions when the witness is unable to attend the trial. The Rules of Evidence govern the admissibility of a deposition at trial. CrR 4.6(d). ER 804(b)(1) requires the proponent of the deposition to establish the unavailability of the deponent before the testimony may be admitted at trial. This required a good faith effort to obtain the presence of the witness at trial. State v. Scott, 48 Wn. App. 561, 564-65, 739 P.2d 742 (1987), *affirmed*, 110 Wn.2d 682, 757 P.2d 492 (1988) (this issue not discussed). The three troopers were available, just not on June 20.

Calhoon also implies that the four troopers were interchangeable and that any one of them would have been able to present the State's case. That is obviously not the situation, as can be seen from the testimony of the four at trial. Trooper Ball was involved from start to finish, and had the video from his car camera to show the entire incident. RP 143-199. Sgt. Prouty, RP 200-07, Trooper Bendiksen, RP 208-15, and Trooper Rosser, RP 226-27, each witnessed parts of the incident, and each took different actions. In order to present the entire picture of the events, the State needed all four witnesses.

Calhoon further finds the court's grant of the continuance to be improper because he had been in custody for approximately nine months. But the order for a mental health evaluation was entered on October 14, 2015, and an order of competency was not entered until April 18, 2016. More than six months of that time was due to competency issues, not a failure of the State to bring Calhoon to trial. He concedes that this time period is excluded from the speedy trial calculation. CrR 3.3(e)(1); Appellant's Opening Brief at 22.

Lastly, Calhoon finds fault with the State for failing to indicate why two of the troopers did not notify the prosecutor earlier of their

unavailability or what efforts the prosecutor made to secure their presence. He does not point to any particular requirement that the prosecutor do these things. The fact remains that the prosecutor moved for a continuance within the speedy trial time, the court acted well within its discretion in granting it, and there was no violation of CrR 3.3.

3. The trial court did not abuse its discretion by allowing evidence that Calhoon refused to cooperate with the troopers, resisted arrest, and displayed written material indicating his unwillingness to submit to authority.

Trooper Ball testified at length regarding the chase and eventual detention of Calhoon. RP 143-199. The court permitted the State to play for the jury a video from the dash camera in his vehicle that recorded the entire event, including Calhoon's refusal to cooperate after his vehicle was stopped, necessitating that he be forcibly removed from the car. RP 41-42; 165-182. The trial court also admitted a photograph showing the bumper sticker on the rear of Calhoon's vehicle. RP 41; 187-88. Also admitted was a photograph of a business card which Calhoon handed Trooper Rosser during one of the stops. RP 234-35.

Calhoon argues that all of this was "flight evidence" which was not particularly relevant to the charge he was facing at trial and

which was prejudicial. He maintains that his defense rested on the argument that his driving was not reckless and that the contested evidence would compel the jury to disregard that argument. Appellant's Opening Brief at 30.

a. The evidence is probative of intent.

While the prosecutor did argue that this was flight evidence, RP 35, the gist of his argument was that it demonstrated Calhoon's state of mind. RP 34-36. The court admitted it to show his state of mind. RP 41-42. The court further found that the probative value outweighed any prejudice to Calhoon. Id.

The State was required to prove that Calhoon willfully failed or refused to stop his vehicle after being signaled to do so. Jury Instruction No. 10; CP 73. All of the challenged evidence goes to show that Calhoon believed that the State of Washington and its agents had no authority over him and he was not required to obey any orders, signals, or other communications from those agents. That speaks to whether he willfully refused or failed to bring his vehicle to a stop when signaled to do so. Without knowing about this mindset, Calhoon could easily have argued untruthfully at trial that he was just confused, inattentive, or mistaken.

b. The State is entitled to put the whole story before the jury.

Washington courts have long recognized what is sometimes called the res gestae or same transaction analysis. State v. Thompson, 47 Wn. App. 1, 11, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987). This often allows in evidence of other crimes "'[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *affirmed*, 96 wn.2d 591, 637 P.2d 961 (1981), quoting E. Cleary, *McCormick's Evidence* § 190, at 448 (2d ed. 1972).

> The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "[A] party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

Tharp, 27 Wn. App. at 205, quoting State v. King, 111 Kan. 140, 145, 206 P. 883, 885 (1922).

While many courts have framed res gestae evidence in terms of an exception to ER 404(b), the Court of Appeals has found that it "more appropriately falls within ER 401's definition of

'relevant' evidence, which is generally admissible under ER 402." State v. Grier, 168 Wn. App. 635, 644, 646, 278 P.3d 225 (2012). It is not really the kind of prior misconduct contemplated by ER 404(b), but rather relevant evidence that provides the context of the charged crime. It completes the story. Id. at 647.

As with any evidence, the probative value must outweigh the potential for prejudice. State v. Lane, 125 Wn.2d 825, 831-32, 889 P.2d 929 (1995) (considering the issue in terms of ER 404(b)); Grier, 168 Wn. App. at 649; Tharp, 27 Wn. App. at 205-06. That determination is within the discretion of the trial court and will not be disturbed unless that court abused its discretion. Tharp, 27 Wn. App. at 206. The court abuses its discretion when its ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Id.

In Calhoon's trial the court admitted the challenged evidence because it was probative of his intent. The record supports that evaluation. There was no abuse of discretion. The State had the right to present the entire picture of the event rather than allowing Calhoon to isolate only the least damaging pieces of evidence and be in a position to argue a theory that would not be possible if the jury knew the entire story. Calhoon wanted to present a false

picture by claiming that the truth would prejudice him. The court did not abuse its discretion.

4. The trial court did not violate Calhoon's constitutional right of self-representation.

Calhoon filed a motion on May 19, 2016, to proceed pro se. CP 184. A hearing was held on June 8, 2016.[2] 06/08/16 RP. Calhoon told the court he wanted to administer the case himself, with "side counsel" to assist him. 06/08/16 RP 34, 36. He said that he didn't know what was going on with his case, and what he was experiencing was nothing like what he had seen in court thirty years before. 06/08/16 RP 36.

The court conducted a lengthy colloquy with Calhoon, during which he explained his understanding of the political structure of the United States as well as his status as a citizen. When the court expressed reservations about allowing him to represent himself, Calhoon replied:

> Again, I'm not representing myself. I don't mean to interrupt. Like I said, there are persons. I can't represent myself, I am myself. Okay. I don't have—I'm not like him. There's two of us, okay. I am me, okay, and there's a misunderstanding here. I've been mischaracterized to be a person here. I'm not this what you have on this paper. It's not my permission

2 Calhoon filed a second motion on June 28, 2016. CP 120.

> to be on that paper and my identity was stolen and that's that.

06/08/16 RP 38.

Relying on State v. Englund, 186 Wn. App. 444, 345 P.3d 859 (2015), the trial court denied Calhoon's motion on the ground that he lacked the capacity to represent himself. 06/08/16 RP 52; CP 153.

A defendant in a criminal case has a constitutional right to waive the assistance of counsel and represent himself. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). The right is not absolute; the presumption is against waiver. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). The request must be made knowingly and intelligently. A defendant may not, by representing himself, disrupt a trial or other hearing and he must comply with procedural rules and substantive law. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). A court's decision to grant or deny a motion to proceed pro se is reviewed for abuse of discretion. The degree of discretion to be exercised in regard to timeliness varies with the time span between the motion and the trial. The more time there is between

the motion to represent oneself and the trial, the less discretion the court has to deny it. Id. at 106-07. A court abuses its discretion when its decision is "manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Madsen, 168 Wn.2d at 504 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A trial court has the discretionary authority to manage its own affairs so as to achieve an orderly and expeditious disposition of cases. Woodhead v. Discount Waterbeds, 78 Wn. App. 125, 129, 896 P.2d 66 (1995). As noted earlier in this argument, the right to represent oneself does not allow a defendant to "abuse the dignity of the courtroom," or fail to comply with procedural rules and substantive law. Faretta, 422 U.S. at 834. While a defendant cannot be prevented from representing himself on the grounds that he lacks legal knowledge or skills, he can be prevented from interfering with the efficient administration of justice. Id. at 836; Stenson, 132 Wn. App. at 738. Those cases in which the reviewing court has upheld the right of a defendant to represent himself involve records showing no disruption or disrespect on the part of the defendant. State v. Hemenway, 122 Wn. App. 787, 795, 95 P.3d 408 (2004).

While it is true that a court may not deny self-representation because of a lack of legal training or skills, it may take into account his mental capacity and whether or not that will have "serious and negative effects" on the ability to defend himself. In re Pers. Restraint of Rhome, 172 Wn.2d 654, 669, 260 P.3d 874 (2011). "A trial court may consider a defendant's mental health history and status when competency has been questioned, even where the defendant has been found competent to stand trial." Id. at 667. Judges are to be sensitive to mental health issues when ruling on a motion to waive counsel, but a separate evaluation of competency to represent oneself is not required. Id. at 666. The trial court's decision is reviewed for abuse of discretion. Id. In Rhome, the court cited with approval cases discussing the duty of the trial court to protect not only a defendant's right to represent himself but also other countervailing constitutional rights.

> [A] trial court's discretionary decision to accept a waiver of counsel in favor of pro se representation allows consideration of the impact such a waiver will have on countervailing rights. . . Although [the trial judge] could have expressly included a discussion of such concerns in his colloquy, the absence of such discussion does not make his decision to grant Rhome's waiver an abuse of discretion.

Rhome, 172 Wn.2d at 669.

In Rhome, the defendant had been granted the right to represent himself at trial, and complained on collateral attack that both the state and federal constitutions require the court to enter specific findings of fact that a defendant is competent to waive his right to counsel and represent himself. The court disagreed with him and affirmed his conviction, but, as noted above, discussed that a finding of competency to stand trial does not necessarily mean that the defendant must be allowed to represent himself. Citing to State v. Kolocotronis, 73 Wn.2d 92, 436 P.2d 774 (1968) and State v. Hahn, 106 Wn.2d 885, 725 P.2d 25 (1986), the court concluded that those cases allow a trial court to consider a defendant's competency to represent himself at trial even where he has been found competent to stand trial. A trial court may consider "the background, experience, and conduct of the accused," but not his judgment and skill. Rhome, 172 Wn.2d at 663. Competency to stand trial supposes that the defendant will assist his attorney, not represent himself. Englund, 186 Wn. App. at 457. In Englund, the appellate court deferred to the trial court because it had observed Englund demeanor and conduct as well as his words. Id.

In Calhoon's case, the trial court took into account his observations of the defendant, documents he had filed with the

court, and his colloquy during the hearing. 06/08/16 RP 51-52. Calhoon had filed several nonsensical documents such as a Declaration of Political/Citizen Status, Release and Discharge, CP 180-83; Pretrial Motion to Dismiss, CP 212-61; Request to Order Public Defender . . . to Write Anders Brief . . ., CP 262-74. He persisted in claiming that the state is a corporation under admiralty jurisdiction. CP 150; 06/08/16 RP 12, 24, 29. He maintained that the United States has been under marshal law since the Lincoln administration. 06/08/16 RP 18. He believed he did not have any obligation to license his car or himself before driving on the public highways. 06/08/16 RP 22-23.

In a different way, Calhoon was as incapacitated as Englund. Englund could not understand the most basic questions the court posed to him Englund, 186 Wn. App. at 458. Calhoon held to a completely false idea of what the law is, what the political structure of the federal and state governments is, what his rights and obligations as a citizen are, and whether the court had authority over him. He believed he was in a British Crown court rather than the common law court he thought was the appropriate jurisdiction. 06/08/16 RP 9, 16. The trial court had every reason to conclude that Calhoon lacked the capacity to conduct his own

defense. Although he had caused no disruption in the courtroom, he had never been presenting his case to a jury, a time when he would feel the need to apply his own skewed views of the justice system. He certainly was disruptive when the State Troopers attempted to stop his vehicle and arrest him. Just as lack of capacity was a proper ground upon which to deny Englund's right to represent himself, so it was in this case. Englund, 186 Wn. App. at 456. There was no abuse of discretion.

5. The State will not seek costs on appeal in the event that it substantially prevails.

Even if the State substantially prevails on appeal, it will not file a cost bill. This court has routinely declined to impose costs of appeal on defendants found indigent for purposes of the trial and appeal. Even though Calhoon referred at sentencing to "my ranch," he has been found indigent and the State expects that any cost bill would be denied.

In addition, it is abundantly clear from the record that Calhoon will never pay a dime toward the legal financial obligations imposed by the trial court. RP 322-23. There seems no point in expending State resources to collect appellate costs, even if they were awarded.

D. CONCLUSION.

The trial court did not abuse its discretion by ordering Calhoon to wear a leg restraint, it did not violate his court rule right to a speedy trial, it did not err by admitting evidence of Calhoon's anti-authoritarian beliefs, and it did not violate his constitutional right to represent himself. The State will not seek costs if it prevails on appeal. The State respectfully asks this court to affirm the defendant's conviction.

Respectfully submitted this 19th day of April, 2017.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

Electronically filed at Division II

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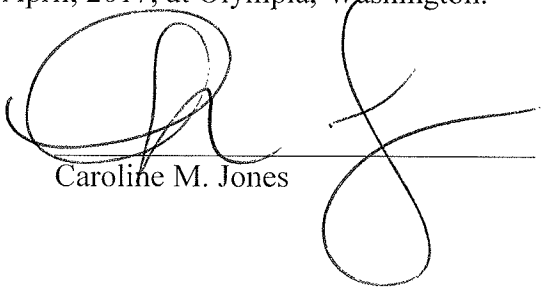
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of April, 2017, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTOR
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